United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,
vs.
LOUIS ANDERSON,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

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STATEMENT OF THE CASE.

This is an action instituted by Louis Anderson, the plaintiff below and defendant in error here, against the Federal Mining & Smelting Company, a corporation, the defendant below and the plaintiff in error here, to recover damages for personal injuries alleged to have been sustained by the plaintiff, due to the alleged negligence of the defendant in the particulars hereinafter stated, while in the latter's employ in what is commonly known as the Morning mine, situated near the town of Mullan, in Shoshone County, Idaho. The respective parties will for convenience be referred to respectively as plaintiff and defendant. The plaintiff is an experienced miner, and at the time of the accident had been engaged in mining for eighteen or nineteen years, and had been employed in the capacity of a ma-

chine man for more than fifteen years. He had been working in the Morning mine for about a year in the capacity of a machine man, and in the stope in which he was engaged for two or three months, and in the particular place in which he was engaged for six or seven days. (Tr. pp. 41-42; 57-58). At the time of the accident he was drilling into the rock which fell. At the trial it was conceded to be the duty of the machine man to inspect the place in which he was about to work, and accordingly it was the duty of the plaintiff in the particular instance to have inspected the particular place in which he was about to set to work and the conditions of the particular rock which fell. This duty devolved upon the plaintiff, not only by virtue of the general custom and method of mining prevailing in the mine of the defendant, and other mines in the district, but also by virtue of two rules adopted by the defendant, said rules being Nos. 2 and 3 and are as follows:

> "2. It is the duty of all employes to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in mine or its workings.
>
> "3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the Foreman or Shift-Boss must be notified."

Plaintiff testified again and again that it was his duty to inspect the place in which he was working, that he was perfectly competent to make such inspection, and that he ordinarily did make such inspection, and that had he made such inspection he could have discovered that the place in which he was working, and the particular rock which fell, was not safe, and that it was his duty then, to remove all dangers and he could have removed such dangers before setting to work, but excused his failure to make the inspection on this day, and to bar down the rock which fell, by reason of the fact that the shift boss, one Brown, came along and told him that the place was all right, and that the plaintiff should set to work to drill. The testimony of the plaintiff in this particular is found on pages 46 and 47 of the transcript, and is as follows:

"Q. What did your shift boss tell you?

"A. The shift boss asked me if I ain't doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and I take it as I come.

"Q. What else did he tell you?

"A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

"Q. Did he say anything to you about whether he had tested it himself?

"A. No. He said he found out that the place was all right.

"Q. He said he had found out that the place was all right?

"A. Yes."

And then the plaintiff testified that he started in to drill. The shift boss denied that he had had this conversation with the plaintiff, but said that he stated to him that the place did not appear to be all right and that the plaintiff should bar down before setting to work to drill. (Tr. pp. 127-128). The only question of alleged negligence, charged as being the proximate cause of the accident, which was submitted by the trial court to the jury, was as to whether or not the said alleged assurance of safety and direction to proceed to work was given by the shift boss Brown to the plaintiff. The court's direction upon this point is found upon pages 186 and 187 of the transcript, and is as follows:

"In the second place, it may be that you did not fully understand what I meant to say to you about the duty of the master, the defendant in this case, to use reasonable care to see that the place where the plaintiff was working was kept in a safe condition. I did say, and intended to say, that that is a primary duty of all employers of labor. In this case, however, under the conditions, it was entirely proper for the defendant to discharge that duty to one like the plaintiff by employing him as a skilled miner, as a miner of experience, and im-

pose upon him the duty of making inspection of the place where he was about to go to work, and to bar down any loose rock. He, upon his own testimony, assumed that duty in this case. He admits that that was his duty, and hence the defendant company was not in the first place responsible for the discharge of that duty to him. It was his duty to bar down this rock and his duty to make inspection and see whether the place was safe. And if the foreman did not, while he, the plaintiff, was making such inspection, come along and direct him to stop his inspection, and to go to work with his drill, then, as I have already tried to make plain to you, he couldn't recover, and, *as I have tried to make plain to you, it comes to be merely a question of fact as to whether or not the plaintiff is telling the truth about what Brown said to him, or whether Brown is telling the truth in his testimony as to what occurred there when the two were together.* That is all. You may retire now with the bailiff."

Assuming then that the said assurance and direction were given the plaintiff by the shift boss Brown, the principal question which is presented for review upon this writ of error is as to whether or not, in the giving of such assurance and direction, the shift boss Brown was a fellow servant of the plaintiff, or a vice-principal of the defendant, and if the shift boss was a fellow servant of plaintiff, then manifestly the judgment below can not be sustained.

The jury rendered a verdict of $7500 in favor of the plaintiff, and on motion for a new trial, a remittitur was granted of $2500 which was accepted by the plaintiff and a judgment entered for $5000.

It is to be observed that the only issue of alleged negligence submitted by the court to the jury, namely, the alleged negligent assurance of safety and direction to proceed to work given by the shift boss Brown, was not raised by the pleadings, the complaint and the amended complaint in the action alleging that the negligence of the defendant consisted in permitting the place, where the plaintiff was injured, particularly the back into which the plaintiff was drilling, to become and remain in a dangerous and unsafe condition.

In paragraph 7 of the amended complaint, it is alleged that the plaintiff did not know, and had no means of knowing, and by the exercise of due care, could not have discovered the dangerous and unsafe condition of the place in which he was performing his duty; that he was not provided with the means of testing the over-hanging rock; that he did not discover the same, and in the exercise of reasonable care, could not have discovered the same; that it was not his duty to test the condition of the over-hanging rock, nor to examine the same, but it was the duty of the defendant to do so, and that the defendant omitted to do so, and that it was the latter's duty to inspect the ground for the purpose of ascertaining whether there was any danger from over-hanging rock, and that it was not the plaintiff's duty to make such tests, and that the defendant

negligently failed to make the same. This Court will observe that there is not a line either in the complaint or the amended complaint to the effect that the defendant negligently or otherwise gave any assurance of safety of the place, or gave the plaintiff direction, upon such assurance, to set to work and drill underneath the rock which fell. The theory upon which the complaint and the amended complaint were drawn was entirely abandoned by the plaintiff upon the trial, and as stated, the only ground upon which this cause was sent to the jury was that the master had, through a supposed vice-principal, the shift boss, assured plaintiff that the place was safe, and directed him to proceed to work and drill under and into the rock which fell and caused the injuries to the defendant in error.

Contrary to the allegations of the amended complaint, the plaintiff both on direct examination and on cross examination, repeatedly admitted that it was the duty of the miner to inspect the place in which he is about to set to work for the purpose of determining whether there was any loose or overhanging or dangerous rock, and that the tools for such purposes were provided by the master, although it is claimed that the plaintiff could not find a bar. However, the trial court ruled, as we understand it, that the plaintiff assumed the risk of the failure to furnish such a bar, if indeed it is a fact that such failure existed.

The fact that it was the duty under the customs and rules of the mine of the plaintiff to inspect and bar down and make reasonably safe the place in which he

was working, became so obvious that the trial court ruled a number of times sustaining objections to the admission of such testimony, and stated that the necessity for proof of this fact was obviated by the repeated admissions of the plaintiff. (Tr. pp. 79-80)

On cross examination, on page 59 of the transcript, plaintiff testified:

"Q. And you did know the duties of a machine man underground, did you?

"A. I knowed it, yes.

"Q. You know the duties of a machine man under the customs in that mine, the first thing he must do is to bar down?

"A. Yes.

"Q. And when you went on shift that day you knew the first thing you must do was to make your place safe by barring down, isn't that correct?

"A. That's right."

And on further cross examination on pages 63 and 64 of the transcript, he admitted that if there was loose ground or rock and it should be barred down, then it was the duty of the machine man to get the timbermen to put a sprag under the ground to hold it, and also admitted that there were plenty of sprags there; that sometimes powder was used by the machinemen to blast out rocks which could not be barred down or spragged, and that plenty of powder was available for

the men for that purpose. In fact it is one of the miner's duties to test the ground and bar down, or other wise secure the same, before setting up to drill underneath it. And his contract of employment contemplates that he must do these things and have adequate experience and skill to take care of his place of work under any given conditions.

There is absolutely no evidence from which the jury could have found as a matter of fact, or the court could have found as a matter of law, that the shift boss was the vice-principal of the master or had any right or authority to advise the plaintiff, contrary to the obvious fact, that the place was safe, or to direct him to work beneath a rock which was dangerous; but there is abundant evidence, as we have seen, that it was the miner's duty to make the inspection and to bar down rock which was by such inspection found to be unsafe. The evidence further discloses that the shift boss had quite a number of men under him working in different parts of the stopes. Mr. Brown, the shift boss, testified that he had from 35 to 40 men under him, and that he had the 1600 and 1800 levels to look after, each of which is 200 feet deep; and there are 22 floors between the 1600 and 1800 levels, and also 22 floors between the 1400 and 1600 levels; (Tr. pp. 123-124) that he did not get to the place where plaintiff was working for an hour and three-quarters after they went on shift. (Tr. p. 125) In the meantime he was going through the other floors; that his men were scattered over both levels; that he made the rounds of the shift only two or three times a day. In other words the evidence

conclusively shows that the plaintiff went to work at the place where he was injured immediately upon going on shift; that the shift boss did not go around there until an hour and three-quarters after that time, and that the shift boss had not been at that place before the plaintiff went to work, and that he knew of this fact.

It further conclusively appears from the evidence that the miners generally, who are continuously working in a given place barring down or drilling, have the better opportunity of ascertaining the character of the place than does the shift boss, and this is particularly true as to the opportunity which the plaintiff had of knowing that the place under which he was working was in a dangerous condition.

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to instruct and direct the jury to bring a verdict for the defendant for the following reasons, to wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint, he was injured by and through a risk of his employment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the amended complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND THE JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injuries to the plaintiff. The evidence is insufficient to show that the direction and assurance alleged to have been given the plaintiff by the shift boss was actually given by the shift boss to the plaintiff, and the evidence is insufficient to show that the language al-

leged to have been used by the shift boss was an order to the plaintiff to cease inspection and to stop barring down and a direction to proceed to work and an assurance of safety to either or any of them.

(b) The evidence conclusively shows that the proximate cause of plaintiff's injuries was the negligence of a fellow servant, to-wit, the shift boss. In this respect the evidence not only does not show that the shift boss was authorized by the defendant either by the written rules and regulations adopted and promulgated by the defendant or by the customs existing in defendant's mine to give such alleged assurance and direction under the then circumstances, but conclusively shows that the shift boss was not empowered by the defendant to give such alleged assurance and direction, and conclusively shows that the alleged assurance and direction of the said shift boss to the plaintiff was a violation of the duty which the said shift boss owed not only to the plaintiff but to the defendant as well, the violation of which duty on the part of the said shift boss could not have been foreseen or guarded against by the defendant, and which could not consequently be charged as negligence of the defendant.

The evidence further conclusively shows that the alleged assurance and direction of the shift boss, if the same actually were given, were a direction and assurance given by the shift boss to the plaintiff in reference to an executive detail of the work over which the plaintiff had exclusive control under the rules and regula-

tions and customs of the defendant's mine. The evidence further conclusively shows that the shift boss was not a superintendent or head of a department but simply in charge of a number of men in defendant's mine and that the men of whom the said shift boss was in charge, including the plaintiff, were with the shift boss engaged in the common object and employment and work of mining ore, and the plaintiff and the other miners on this shift were therefore fellow servants of the said shift boss.

(c) The evidence conclusively shows that despite the alleged assurance of safety and direction to proceed to work, the danger to which the plaintiff was exposed was so obvious that he assumed the risk thereof, it conclusively appearing from the evidence that the plaintiff was a miner of some sixteen years' experience, had worked in the employ of the defendant as a miner for more than a year and in the particular stope in which he was injured for more than a month, and in the particular place in which he was injured for more than three days; that under the rules, regulations and customs of the defendant's mine it was the duty of the plaintiff to examine and test the ground in or under which he was about to set to work to drill before commencing such drilling operations, and to bar down or remove any loose or dangerous rocks before commencing such drilling operations; and the evidence further conclusively shows that the plaintiff not only was perfectly competent and able to perform such duty but that he had the means and instrumentalities with which to do it and could, but for the said alleged as-

surance and direction of the shift boss, have rendered the place in which he was working safe. The evidence further conclusively shows that the plaintiff had the greater and better opportunity than the shift boss to determine whether or not the ground was reasonably safe and whether or not the same should be barred down or otherwise removed; and further conclusively shows that under the then existing condition under the rules, regulations and customs of the said mine he had no right to rely upon the alleged assurance of safety and direction to proceed to work.

(d) The evidence conclusively shows that the negligence of the plaintiff contributed to his own injuries in this that he set to work under ground which he knew it was his duty to inspect and examine without having made the necessary examination to determine whether the ground was safe or not to work under and without having adequately secured the same by barring down or other methods known to miners, he having had the opportunity and the ability to make such inspection and to adequately guard against the very danger which caused his injury.

(e) The evidence conclusively shows that the alleged assurance and direction of the shift boss, if given, were contradictory of and given in violation of the written rules and regulations adopted by the defendant.

ARGUMENT.

The assignments of error and the specifications wherein the evidence is insufficient to sustain the ver-

dict and judgment thereon may be grouped under two heads, and we will therefore discuss the propositions of law involved thereunder as follows:

PROPOSITION 1. The evidence fails to disclose any negligence on the part of the defendant which was the proximate cause of the accident and resulted in injuries to the plaintiff because the alleged assurance and direction given by the shift boss to the plaintiff were not given by or under the authority of the defendant, but by a fellow servant of the plaintiff for whose negligence in these respects the defendant was not responsible, and the risk of whose negligence plaintiff assumed.

PROPOSITION II. The alleged order and assurance of the shift boss were contradictory of the rules adopted by defendant, and were given in violation thereof.

PROPOSITION I.

The evidence fails to disclose any negligence on the part of the defendant which was the proximate cause of the accident and resulted in injuries to the plaintiff because the alleged assurance and direction given by the shift boss to the plaintiff were not given by or under the authority of the defendant, but by a fellow servant of the plaintiff for whose negligence in these respects the defendant was not responsible, and the risk of whose negligence plaintiff assumed.

A thorough investigation of the authorities discloses that, before a servant will be relieved of his assump-

tion of risk by a negligent assurance of safety coupled with a direction to proceed to work, a certain state of facts must be shown. From a careful study of the decisions it conclusively appears that the master is liable for the giving of such assurance and instruction by a superior servant only in the following cases:

First, where the master owes the servant a positive duty to make the place where he is directed to work reasonably safe, and the assurance of safety and direction to proceed to work are coupled with a failure to give the servant a reasonably safe place in which to work. This line of authorities proceeds upon the theory that the master, upon whom is imposed the duty of making a particular place reasonably safe, has the greater opportunity for observing the condition of such place. Even in such cases it is held that, if it appears from the evidence that the employe has the greater opportunity, or even an equal opportunity with the master, to determine the nature and character of the place where he is set to work, then an assurance and direction of the master does not relieve the servant of the assumption of risk.

It may be well to dispose right here of this class of cases as being inapplicable to the case at bar. Manifestly none of these conditions are found in the case at bar. In the first place the plaintiff assumed under the rules and customs of the mines the duty of inspecting the place in which he was working for dangers incident to falling rock, and assumed the duty of removing such dangers by barring the same down, or

otherwise guarding against them. (Tr. pp. 59, 61, 62, 63, 64, 79, 80) Moreover, it appears from the evidence that the plaintiff not only had *equal* opportunity with the master to observe the place, but he had the *greater* opportunity to do so. Plaintiff had been working in that place about a week (Tr. p. 78), and on that particular morning an hour and three-quarters before the shift boss came around (Tr. p. 125). Conceding for the moment, but for the purpose of this statement only, that the shift boss was a vice principal of the master, it appears from the evidence that the plaintiff set to work in this place immediately upon going on shift. He had been directed to work there several days before and did not even need a direction on that day to set to work there. (Tr. p. 78). The shift boss who had from thirty-five to forty men under him scattered through two levels in the mine, the 1600 and 1800 levels, was able to get around to his men only twice, or at most three times, each day. (Tr. p. 126.) He actually did not get to the place where the plaintiff was working until an hour and three-quarters after the plaintiff had set to work. (Tr. p. 125.) The evidence conclusively shows that the shift boss had not been around prior to that time, and conclusively shows that outside of the casual visual examination made by him at the time he saw the plaintiff at work for the first on time that day, he had not had an opportunity to examine the place in which the plaintiff was working, nor is it contended that at that time he made any other than such casual visual examination of the place, nor that he made any other examination whatsoever at

any other time. The evidence further conclusively shows that in order to make a minerlike and thorough examination, as was required under the then existing circumstances, it became necessary to examine the ground by means either of a crowbar or the drilling machine itself; and it conclusively appears that the shift boss could not, and did not, make such examination, and, further, that it was not the duty of the shift boss, under the then existing circumstances, to do so, but the duty of the plaintiff himself. (Tr. pp. 59, 61, 62, 63, 64, 79, 80).

The next class of cases where the master is bound by the giving of a negligent assurance and direction to a servant is that class of cases where the master is assuring and directing an *inexperienced* servant. This is obviously likewise not the case here for the plaintiff was an experienced miner, of some sixteen years experience, (Tr. p. 4) had worked in the capacity of a miner for the defendant for more than a year, (Tr. pp. 42, 57) and in the particular stope in which he was working for a matter of more than three or four months, (Tr. p. 57) and in the particular place in which he was working for about a week. (Tr. p. 78.) He held himself out as an experienced miner—hired himself out as such—and testified that he thoroughly understood the duties of miners (Tr. p. 58) and knew that it was their duty to test the ground and bar the same down before setting to work, and that he was familiar with all of the details of the methods which an experienced miner uses in making the place

in which he is working safe for himself. (Tr. pp. 45, 59, 61, 63, 64.)

In both of the foregoing classes of cases it must further appear, as a condition precedent to creating liability upon the master by an assurance of safety and a direction to proceed to work, that the employe was justified in relying, and did rely, upon such assurance.

The evidence in this case not only fails to show circumstances which warranted the plaintiff in relying upon the alleged assurance, but conclusively, as we think, shows that the plaintiff was not justified in relying upon the alleged assurance, inasmuch as he knew it was not the duty of the shift boss, but the duty of the plaintiff himself, to make such careful examination, and that he knew that he had the greater opportunity to make the same and that the shift boss had not made the same and had not had an opportunity to make an adequate inspection.

In this class of cases it is always conceded by the defendant that a wrongful assurance of safety is the negligence of the master, and the defense interposed is that, despite the assurance of safety and direction to work, the danger was so obvious that the servant assumed the risk, and sometimes the defense is interposed that the servant by his own negligence contributed to the negligent assurance and direction of the master. Of course in such cases the courts have justly submitted the question of assumption of risk and contributory negligence to juries, and have held that, before the servant will be held to have assumed the risk,

the same must appear to have been so obvious that a prudent man would not have incurred the risk despite the assurance, and have usually held that the question of contributory negligence is not a matter of law for the court.

But in *all* cases, in order to render the master liable, it must be shown that the particular person giving such assurance and order was in that respect a vice-principal of the master, and not a fellow servant.

The evidence in the case at bar absolutely fails to show that the master had authorized the shift boss to give such assurance and direction, but conclusively shows the contrary. Not only do the rules provide that it was the duty of the plaintiff to make such inspection and a determination as to the safety of the ground, and if the ground was determined by the plaintiff not to be safe, then to take the proper steps to remedy it, but the customs of the miners and the methods of the work required that the plaintiff do this, and not the shift boss.

We realize that the trial court took the view that the shift boss was a vice principal, inasmuch as the rules provided that, if the miners found that they could not make their place safe themselves, then the shift boss must be called; and his Honor inferred from this rule that, inasmuch as in certain instances the defendant may have been said to have left the ultimate determination of whether the place had been rendered safe to the shift boss, it had constituted the shift boss its vice principal in the matter of such supervision,

and was, therefore, bound by the assurance and direction alleged to have been given in this case. However, the rule was manifestly not intended to give, nor did it actually give any additional or greater powers to the shift bosses in the defendant's mine than they had without this rule, or than any other shift boss or foreman of a gang in any other occupation has in reference to directing the men. All superior servants, particularly bosses and foremen—have not only the right to direct their men in reference to the executive details of the work, but have the power to discharge for failure to obey such instruction in respect to such details. We believe we will conclusively show such power of the shift boss does not take him out of the fellow servant class. The great weight of state authorities, and the unanimous holdings of the federal courts, are to the effect that the shift bosses and foremen in the matter of giving instructions to the men working under them are fellow servants of the men, and that negligence in giving such instruction, even if coupled with an assurance of safety, express or implied, is the negligence of a fellow servant and not the negligence of the master. Moreover the facts, contemplated by the master to exist before the shift boss is expected to assume special direction of the men in assisting them in making their places safe, are not disclosed by the testimony in this case. The rule provides in substance that, if the miners themselves feel that they are unable, without the assistance of the shift boss, to carry out the duty devolving upon them of making the place safe, then they may, or must, request the assistance of the shift boss.

In this case the evidence conclusively shows that the plaintiff considered himself sufficiently competent to render the particular place safe, and further conclusively shows that he did not need or desire the assistance of the shift boss in this work. The matter of rendering this place safe was comparatively simple for an experienced miner. The interference of the shift boss was, to say the least, officious, and was made under circumstances which the master could not have contemplated and did not contemplate, either in the promulgation of the rule, or in investing the shift boss with the power of direction of the men. The best that can be said of the action of the shift boss was that the same was a breach of duty and a violation of the particular rule in question on his part, which could in no wise have been foreseen or guarded against by the master. Such breach of duty was not the breach of duty of the defendant but was the breach of duty of the shift boss, not only toward the plaintiff in this case, but toward the defendant as well, and for such breach the defendant cannot be held responsible nor mulcted in damages.

Turning for a moment to the question of the dangers of falling rock as being an incident of mining, the risk of which is assumed by the servant. There can be no question that the danger of falling rock, where it is the duty of the employe to inspect and remove that danger, is an incident and risk in mining which the miner assumes. When the plaintiff set to work there he knew that, unless a proper inspection was made by him by testing the ground as the miner understands such work must be done, he would become exposed to dan-

gers of falling rock; and that is a danger the risk of which is assumed. The danger of rock falling from ground which has not been properly examined is so obvious that any miner of the plaintiff's experience, who undertakes to work under such ground, must conclusively be presumed to have assumed the risk.

As has already been seen, this was the view which his Honor took of the law at the trial of this case.

If, therefore, the assurance and direction of the shift boss was not the assurance and direction of the master, that is, if the master did not authorize the same, but if such assurance and direction was the assurance and direction of a fellow servant, the plaintiff cannot recover.

The main question in this case then is: Were the plaintiff and the shift boss fellow servants?

The rule in the federal courts as to who are fellow servants is so well settled that no citation of authority should be needed to illustrate the general principle, and it is this: That all persons, irrespective of grade, who are in the common employment of a master, and who are effecting a common object in such employment, are fellow servants; and that the question of whether or not a particular servant is a vice principal of the master does not depend upon the grade of the offending servant, that is, whether one is superior to the other or has authority over the other, but depends upon the character of work in which the particular servant is engaged, that is to say; if the servant is performing a

duty which the law imposes upon a master, such as furnishing the servant with a reasonably safe place in which to work, or furnishing adequate appliances with which to work, or giving inexperienced servants instructions in regard to the work, or performing any other duty which the law imposes upon the master, then such offending servant, irrespective of rank or grade, stands in the shoes of the master and is a vice principal, because the law does not permit the master to delegate such duty without making the person delegated to perform the same his vice principal. The leading case upon this proposition, of course, is the case of B. & O. Rd. Co. v. Baugh, 13 Sup. Rep. 914; 149 U. S. 368; 37 L. ed. 772.

We think that it cannot be contended in this case that the shift boss was the vice principal of the master in giving this assurance and direction; that is, that he was performing a personal duty imposed upon the master by law, which was delegated to the shift boss. In this contention we think we are substantiated by the great weight of the state authorities and by all of the federal authorities.

In the case of City of Minneapolis v. Lundin, 58 Federal 525, the plaintiff was a blaster over whom one Holdquist was foreman. Holdquist had been informed that one of the blasts had not exploded. The plaintiff did not know that there was any unexploded dynamite. Holdquist, with the knowledge that there remained an unexploded blast, directed the plaintiff to reload the holes without telling him that the dynamite remaining

had not been exploded, and it was the negligence of Holdquist in giving such direction, without notifying the plaintiff of the fact that there remained unexploded dynamite which was known to the shift boss Holdquist, that the injury occurred. In this case, therefore, there was a direction, coupled with an implied assurance of safety, in the face of positive knowledge of the gravest danger. The Circuit Court of Appeals of the Eighth Circuit, in rendering its opinion (p. 527), say:

> "In our opinion, the two authorities first cited, supra, are decisive of the question here at issue. In the first case it was held that an engineer who, under the rules of a railroad company, was 'regarded as conductor,' and who had the direction and control of his engine and of his fireman upon it, was not a vice-principal of the company, and that the latter was not liable for an injury to the fireman, caused by the engineer's negligent disregard of his orders. In the second case this court held that the fact that the foreman of a crew of 10 men had authority to direct them where to work and what to do, and was intrusted with the duty of propping the roof of a room in a mine, and keeping it safe for these workmen who were engaged with him in mining coal, did not make him a general vice-principal where his crew was one of several working under the general direction of a pit boss and a general superintendent, but that the liability of the company for his negligence must be determined by the nature of the duty he was performing when he caused the injury."

And again in considering whether or not, under the then circumstances, the foreman Holdquist was a special vice principal the Court of Appeals say at page 529:

> "It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him that there was dynamite in one of them. But the duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a working as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the

foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible. Each employe assumed the risk of this negligence of his fellow servants when he entered the common employment. Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. Rep. 433; Bunt v. Mining Co., 138 U. S. 483, 11 Sup. Ct. Rep. 464; Killea v. Faxon, 125 Mass. 485.

"The result is that the foreman was not the vice-principal of the city, but was the fellow servant of the defendant in error in the performance of the only act of negligence disclosed by the record, and the circuit court should have instructed the jury to return a verdict in favor of the city. Railway Co. v. Davis, 3 C. C. A. 429, 53 Fed. Rep. 61; Gowen v. Harley, 56 Fed. Rep. 973, 980; Monroe v. Insurance Co., 3 C. C. A. 280, 52 Fed. Rep. 777; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266;

Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Railway Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905; Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. Rep. 972."

In the case of Alaska Treadwell Gold Mining Company v. Whelan, 168 U. S. 68; 42 L. ed. 390, it appeared that the foreman of a mine crew whose duty it was to warn the men under him when he drew a chute of ore, negligently failed to give such notice or warning, and the plaintiff was by reason thereof drawn into the chute and severely injured. Therefore, in this case, too, there was an implied assurance of safety, coupled with a direction to proceed to work, and, more than that, the shift boss was the man whose active negligence thereafter caused the injury. The Supreme Court of the United States at page 391 say:

"The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to support a verdict for him; and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow servant of the plaintiff, should have been granted.

"Finley was not a vice-principal nor a representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang

of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men.

"The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one. Central Railroad v. Keegan, 160 U. S. 259 (40:418); Northern Pacific Railroad v. Charless, 162 U. S. 359 (40:99); Same v. Peterson, 162 U. S. 346 (40:994); Martin v. Atchison, T. & S. F. Railroad, 166 U. S. 399 (41: 1051). See also Wilson v. Merry, L. R. 1 H. L. Sc. App. Cas. 326.

"This ground being decisive of the case, no opinion need be expressed upon other questions argued at the bar."

In the case of N. P. Rd. Co. v. Hambly, 154 U. S. 349; 38 L. ed. 1009, it appeared that plaintiff was a day laborer under the control of a section boss or foreman assisting in building a culvert on the defendant's railroad line. The defendant claimed that the conductor and locomotive engineer of the train which ran plaintiff down were fellow servants of the plaintiff. The Su-

preme Court of the United States held that the plaintiff could not recover because the plaintiff and the said conductor and engineer were fellow servants.

In the case of Central R. R. Co. of New Jersey v. Keegan, 160 U. S. 259, 40 L. ed. 418, the plaintiff was a member of a crew which moved cars at night. One O'Brien was the foreman of that crew, and the one whose duty it was to direct what cars should be taken, when and where they should be moved, when the movement should start, and where it should stop. It was in obedience to his orders that one or the other of the men employed in his crew went to one place or another and coupled or uncoupled particular cars. The negligence complained of was that O'Brien, or some one else, should have been on the rear car of those moving backward O'Brien had ordered the defendant in error to uncouple cars which he, O'Brien, had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond them, without himself being on the moving cars or seeing that some one was there to exercise control over the movement. It will, therefore, be observed that in this case there was not only a direction to do a specific piece of work, but an assurance, at least implied, of safety, coupled with a failure to keep a lookout, as well as contradictory negligent orders. The only question arising in the case was as to whether or not O'Brien was a fellow servant of the plaintiff. The Supreme Court of the United States, Mr. Justice White delivering the opinion, quote with approval from the case of O'Brien v. American Dredging Co., 53 N. J. L. 291, as follows:

"Whether the master retains the superintendence and management of his business, or withdraws himself from it and devolves it on a vice-principal or representative ,it is quite apparent that, although the master or representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen and where necessary to groups or gangs of workmen, and in such case that one should be selected as the leader, boss or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in the respect, in the precise position of his other fellow-servants."

And again quote from the opinion in the case of N. Y. C. & H. R. R. Co., 136 N. Y. 77, as follows:

"It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants

> of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent coservants, and prescribe such regulations as experience shows may be best calculated to secure their safety."

In commenting upon the last quotation the Supreme Court say:

> "We adopt this statement as proper to be applied to the case at bar. A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."

In the case of American Bridge Co. v. Seeds, 144 Fed. 605, it appeared that the plaintiff, an experienced bridge builder, was under the direction of a foreman. The plaintiff had only worked about ten days on this bridge. Just before the accident a fellow workman of the plaintiff had hitched the rope to two iron cords, weighing about a thousand pounds each, which it was desired to move by means of a derrick upon a traveling crane, the rope extending from the top of the traveling

crane in a slanting direction toward the iron cords. But the rope had become unloosened. At that moment the plaintiff came down from the traveling crane, and the foreman said to him, "Go there and hook that chain; don't be in such a damned hurry to get away. You men are in too damned big hurry to get away from the work. Stay there until I tell you to leave—that's what I am here for." The plaintiff walked over to the middle of the cords and wrapped the chain around them and hooked it and waited there, pursuant to the direction of the foreman, to see that the rope did not again become unhitched. The foreman stood four or five feet higher than he did and at a place where the men on the traveler could see his signals. It was the duty of the foreman to give the signal to hoist. The signal that should have been given was a signal to hoist slowly in order that the rope would take up its slack slowly so that the plaintiff could observe from the place where he stood that the rope would not become loose again. Instead of this the foreman gave a "high-ball," which signified that the laod should be raised as rapidly as possible, with the result that the whole load was suddenly swung against the plaintiff and he was knocked off the bridge. It will be observed that in this case there was not only a positive direction to the plaintiff to place himself in a certain position, coupled with an implied assurance that the place was safe and that the foreman would so direct the hoisting as not to injure the plaintiff, that is that the foreman would give the usual slow signal, but the acts of the foreman in these respects were coupled with his active negligence, not

only in failing to warn the plaintiff that he was about to give the "high-ball" signal, but in actually giving such "high-ball" signal, which the foreman knew, at the time it was given, must necessarily result in throwing the mass to be lifted against the plaintiff, and which the foreman knew must result in knocking the plaintiff off the bridge onto the ice below. The Circuit Court of Appeals of the Eighth Circuit in commenting upon this evidence, say:

> "The foreman was the fellow servant of the plaintiff, and the latter necessarily assumed the risk of the former's negligence, *including the risk of the order which he gave to the plaintiff,* and the risk of the signal which he gave to the man at the niggerhead. *The servant assumes the risk of the negligence of his superior servant in the direction of the me nand of the work,* to the same extent that he assumes the risk o fthe negligence of the fellow laborer by his side who is engaged in performing the work." (Citing a great number of authorities).

And in commenting further upon this state of facts the Court say:

> *"There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants.* But he may lawfully reckon the natural and probable result of his action upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so and this is the only prac-

tical basis for the measurement of acts, rights, or remedies of mankind." (Citing numerous cases).

And again the Court say:

"The independent voluntary act of the foreman who gave the reckless signal which sent the iron cords against the plaintiff and knocked him off the bridge was a breach of his duty incapable of his anticipation."

And again the Court say:

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. . It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servants. The risk that a place will become unsafe, or that safe machinery will become dangerous by the negligence of the servants who use them, is one of the ordinary risks of employment which the servants necessarily assumed, which they accepted. It is a risk of *operation* and *not* of *construction* or *provision* and the duty to protect place and machinery from dangers arising from negligence in their use, is a duty of the servants who use them, and not that of the master who furnishes them."

After the last quotation found on page 611, the Court cite and analyze a large number of cases wherein it was held that the negligence of a boss or foreman in directing his men, coupled with an express or implied assurance of safety in respect of a detail of the work, is the negligence of a fellow servant and not the negligence of the master.

In the case of *Kelly v. Jutte & Foley Co.,* 104 Fed. 955, it appeared that the men were directed by the foremen to use a derrick which had not been completely installed or secured, although the foreman had been advised by one of the workmen that the derrick had not yet been secured, and that its use was unsafe. It was held that the direction of the foreman to his men to use the derrick, with knowledge on the foreman's part that the derrick was not safe or fit to use in its then condition, was the negligence of a fellow servant and not the negligence of the master.

In the case of Lach v. Burnham, 134 Fed. 688, it was averred in the statement that the defendants, acting through their agent the foreman, "put plaintiff to work in such an unsafe and dangerous place and negligently compelled him to work in such a dangerous and improper place and neglected to take such reasonable and proper precautions against the peculiar danger incident to the kind of work at which the plaintiff was engaged, and employed such a careless and negligent foreman under whom plaintiff worked, that the plaintiff, while attending properly and carefully to the performance of his duty, was struck and knocked down and crushed by a large piece of iron."

In commenting upon these averments the Court said:

> "In my opinion, however, the testimony would not establish these averments of fault. *It was not the place that was proved to be dangerous. The real peril to which the plaintiff was exposed arose from the manner in which the foreman ordered the work to be done*, and this, I think, was negligence in his character as a fellow servant, and not in his character as a vice-principal."

And the Court further said:

> "There is evidence that the piles were unstable and the jury would have been justified, I think, in finding that the safest way to do the work would have been to push the piles over and pick up the braces from the ground. The foreman insisted, however, in taking them off singly from the top, thus running the risk of knocking or jarring the pile over while the work of removal was going on, and while the laborers were necessarily close to the ends of the braces. This was apparently an error of judgment on his part and is not to be regarded as negligence; but I repeat that it does not seem to me to be negligence in performing the master's duty to furnish his servant a safe place to work, but negligence in performing his own duty to take down the piles of iron in a proper and careful manner."

So in the case at bar the best that can be said of the testimony is that the shift boss Brown negligently,

or otherwise, committed an error of judgment in assuring the plaintiff that the place was safe and in directing hi mto proceed to work, which is in no sense a negligent act of the master.

In the case of Cleveland C. C. & St. L. Ry Co. v. Brown, 73 Fed. 970, it appeared that the plaintiff was working on a bridge gang whose duty it was to repair bridges, depots, platforms, and other structures. At the time of the accident to the plaintiff and his consequent injury, the gang was tearing down a transfer shed near Cairo, Illinois. It was alleged that the foreman of the bridge gang of which the plaintiff was a member had full authority and control over the men with power to hire and discharge them. In the first count it was claimed that the foreman caused a portion of the roof to be thrown with great violence against the plaintiff. In the second count it was alleged that the foreman negligently ordered and directed that a certain proper brace, which had been placed against the building, be torn down; that such proper brace constituted the principal support of that portion of the structure which was to be torn down, and that he ordered that said post be sufficiently cut near its lower end so that the structure could be thrown over. And it was further alleged in said count that, as a consequence of the negligence of the foreman in ordering the plaintiff to chop and weaken the post aforesaid, the building was precipitated upon the plaintiff. In the third count it was alleged that the foreman carelessly and negligently commanded the plaintiff to go under the said building, the roof of which had not been previously removed, and

to cut near the lower end thereof, thereby weakening the post constituting the principal support of the building, which caused the building to be precipitated upon the plaintiff. The Court held upon this state of facts that the foreman in the giving of such negligent direction was the fellow servant of plaintiff, and that for the neglect of the foreman in these respects the master was not responsible. The Court in part say:

> "There is a duty on the part of the master to provide his servants with a safe place in which to work, but manifestly that principle is not applicable to a case like this where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done."

Assuming, if your Honors please, that in the case at bar plaintiff had requested the assistance of the shift boss in making the place safe, and the shift boss had been negligent in supervising the testing or barring down by giving negligent assurances or directions, or both, could it be said for a moment that in such case the shift boss was not a fellow servant of the plaintiff, for whose negligence in these respects the master cannot be held responsible.

The case of Deye v. Lodge & Shipley Mach. & Tool Co., 137 Fed. 480, was a case where a large iron casting was being moved from a pile, and a similar one from an adjacent pile, also being removed, fell upon the plaintiff and he was injured. The plaintiff had never been engaged in the moving of such castings. He was under

the direction of a foreman by the name of Lutz. It was claimed that the negligence consisted in the failure to properly pile the said castings which had been done under the direction of Lutz. The Court held that the piling of these castings was a detail of the work, and that the foreman was a fellow servant of the plaintiff and his neglect or negligence in properly piling these castings was to be regarded as the negligence of a fellow servant. The Court say:

> "If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as risks of the occupation. If it is the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber, or stone, or barrels, or boxes containing the material to be used by the men upon the premises. Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business."

And again the court say:

> "The conclusion that we reach is that the place where the plaintiff was injured was only dangerous because of the negligence of his fellow workmen

in the manner of carrying on the work, the risk of which he assumed."

In the case of N. P. Rd. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, it appeared that the plaintiff was a member of a railroad gang, and that he was injured by reason of the negligence of the foreman of the gang in suddenly stopping a hand car without warning, which caused a hand car following to run into the hand can under control of the boss, injuring the plaintiff. The foreman or boss had power to hire and discharge men. The Supreme Court of the United States, Mr. Justice Peckham delivering the opinion, in part at page 996, say:

"This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department nor was he in control of such a distinct branch of the work of the master as would be necessary to render the master liable to a co-employee for his neglect. He was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand-car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a

shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen.

"If in approaching the line of separation between a fellow workman and a superintendent of a particular and separate department there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly one of fellow servants. The neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking the proper care at the time when he applied the brake to the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes as a master to his servant when he enters his employment."

Without reviewing we call the Court's particular attention to the following cases upon the question as to when a foreman or boss is a fellow servant:

N. P. Rd. Co. v Charless, 162 U. S. 359, 40 L. ed. 999, 1001;

New England R. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. Rep. 90, 44 L. ed. 181;

Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450;

Vitto v. Farley, 44 N. Y. Supp. 1;

Loughlin v. State, 11 N. E. 371 (N. Y.);

Cullen v. Norton, 26 N. E. 905 (N. Y.).

In Maxwell v. Elk Cement Lime Co., 122 N. W. 225 (Mich.), it appeared that the plaintiff was directed by the master mechanic of the defendant, whose orders it was his duty to obey, to pour water on a burning friction clutch in defendant's mill. Plaintiff procured water but refused to put out the fire until the machinery was stopped. The master mechanic went into another room after which the machine was stopped, and plaintiff, *being assured that it would be still,* stepped with one foot on a concrete pier and the other on the shaft and began pouring water onto the clutch. The master mechanic was standing in front of the plaintiff and the plaintiff having put out as much of the fire as he could, he reached the pail to the master mechanic and as he was taking the pail the shaft started and plaintiff was thrown into the gear and his arm crushed. *It was held that the master mechanic and the plaintiff were fellow servants and that the defendant was not liable for the master mechanic's assurance that the machinery would be still while the plaintiff was at work thereon.*

In Larson v. McClure, 70 N. W. 662, it was held that a laborer in a gravel pit engaged in blasting the bank and shovelling gravel on cars assumes the risk of injury by the caving in of the embankment at a place where he and other laborers are at work. In this case it appeared that the foreman said that the plaintiff was not boss and to keep still. He told the men to keep at work. At the time the plaintiff went right in there to work.

The foreman, Sam Erickson, set him to work there and the plaintiff went to shovelling and loading the cars from the bank where they had taken off the crust. The foreman saw the crack and said he did not think it would come down and plaintiff shovelled there half an hour when the frozen chunk came down on him. It was nine feet long and two and a half feet thick. The Supreme Court of Wisconsin said:

> "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice. The negligence if any, in view of the case, would be that of the plaintiff and his fellow servants and the risk of it must be regarded as assumed by the plaintiff as incident to his employment, and in any view that may be taken of the case it must be regarded as a risk assumed by the plaintiff as incident to his employment. Petaga v. Mining Co., (Mich.) 64 N. W. 335; Peffer v. Cutler, 83 Wis. 281, 284, 53 N. W. 508."

In the case of *Showalter v. Fairbanks Morse Co.*, 60 N. W. 257 (Wis.), it appeared that the plaintiff was injured by reason of the caving in of the bank of a trench. The superintendent had assured the plaintiff

that there was no danger and told him to return to work, and it was held that such assurance did not relieve the plaintiff of the assumption of risk.

In *McKillop v. Shipbuilding Co.*, 127 N. W. 1053, it was held that the foreman of a pile driver gang was a fellow servant of the plaintiff who assisted in taking down a pile driver, and that the assurance of the foreman to the plaintiff that the bent or part which fell was securely fastened, was not binding upon the defendant, but was the assurance of a fellow servant.

In *St. Louis I. M. & S. Ry. Co. v. Needham*, 63 Federal 107, it was held that a railroad company is not liable for injuries to an employe on one train, caused by the negligence of a conductor in its employment on another train, in leaving a switch open; that the conductor and the employe are fellow servants. It was further held that the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master but a duty of the servant as a duty in the operation.

To the same effect see *N. P. R. Co. v. Mase*, 63 Federal 114.

In *American Telephone & Telegraph Co. v. Bower*, 49 N. E. 182 (Ind.), it was held that the negligence of a foreman who climbed a telegraph pole which had already been trenched, and loosened the wires which were the only support of another tlegraph pole on which plaintiff was working, causing it to fall, thereby injuring the plaintiff, was a fellow servant with the

plaintiff. In this case it appeared that the foreman assisted the men in removing the poles and had authority to direct them and had employed and paid the plaintiff.

In the case of *McDonald v. Buckley,* 109 Fed. 290, it was held that a general foreman employed by the superintendent and having charge of the work of putting in the foundation for a warehouse and all of the employes engaged in the work, with power to employ and discharge, *while engaged in the actual work of directing the operations of a pile driver,* giving the signals to the employe for the fall of the hammer, is a fellow servant of the other members of the pile driver gang, and any negligence committed by him while thus working, resulting in injury to another workman, is his personal negligence for which the master is not responsible where there was no negligence of the master in his selection.

In the case of *Westinghouse Church, Kerr & Co. v. Callaghan,* 155 Fed. 397, it was held that *the duty of caring for the safety of a place, or of appliances in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses, is the duty of the servant to whom the work is entrusted and it is not the duty of the master.* It was further held that all who entered the employment of a common master to accomplish a common undertaking, are *prima facie* fellow servants, although their grades of service are different and some direct and

some direct and supervise the men subject to their command and their work, while others perform the labor, *and that the servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work* to the same extent that he assumes the risk of the negligence of a fellow laborer who is engaged in the performance of the work.

Florence & C. C. R. Co. v. Whipps, 138 Fed. 13, (8th C. C. A.) was a case where plaintiff's intestate was a member of a section gang. It appeared that a landslide had occurred in a cut on defendant's railroad. Another gang had worked during the daytime to clear the debris away. While it was still daylight a brakeman from a stalled freight train called the foreman's attention to a crevice on the side of a rock on the mountain side. When the plaintiff's intestate's gang came on with their foreman it had gotten dark and no inspection could be made of this rock, but the foreman on the day shift said in the presence of the foreman of the shift on which plaintiff's intestate was working, upon being asked whether an examination had been made and whether it was all right: "yes, I examined it before dark, and it is all right." It did not appear that actually any such examination was made, but upon faith of the above statement the men were set to work. The action was instituted under a Colorado statute, seeking to recover not exceeding $5,000 damages, upon the theory that the defendant failed to make proper inspection of the rock, did not prop the same and did not give the deceased the required warning.

Upon the question of the duty of the master to furnish his servants with a reasonably safe place in which to work the Court say:

> "It is a general rule of law governing the relation of master and servant that it is the duty of the master to use ordinary care to furnish and maintain a reasonably safe place for the servant in which to perform his work. This rule as to 'safe place' only applies to such place as the master constructs, prepares or selects for such purpose. It has a very limited application to the erection of new buildings or structures, though it may apply to stagings and the like, supplied by the master; *and does not render the master responsible for dangers which necessarily inhere in the work and are only to be guarded against by the care the servants themselves shall exercise in its performance.* Such risks, including the risk of the negligence on the part of fellow servants, are assumed by all who enter into the employment."

And again the Court say:

> "It appears that John McGrath (the foreman of the previous shift) had assumed to make such examintaion as he deemed proper. *If he was negligent in this, although he was a foreman, he was engaged in a common employment with the others, and was a fellow servant. Balch v. Hass,* 73 Fed. 974, 978, 20 C. C. A. 151."

And the Court held that, *if the foreman on the*

previous shift, or the foreman on the shift of plaintiff's intestate, was negligent in representing the place to be safe, that was the negligence of fellow servants. Citing *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 343, 48 L. ed. 1006, and *Pennsylvania Co. v. Fishback*, 123 Fed. 465.

In other words here was a case, like the case at bar, where it was the duty of the servants to guard against the danger inherent in and arising in the course of the work. A direction was given to the men to work in this place coupled with an assurance that tht place was safe. The assurance was given by the foreman, but he was a fellow servant, and such assurance had the same force as one which might have been given direct to plaintiff's intestate, as far as liability of the defendant was concerned. It was held that the negligence of the superior in giving such direction, coupled, as it was, with an assurance of safety, was the negligence of a fellow servant for whose acts in the premises the defendant was not answerable. This case should be read in conjunction with the case of *Lochbaum v. C. R. & N. Co.*, (infra) decided by the Circuit Court of Appeals of the 9th Circuit.

In the case of *Pennsylvania v. Fishback*, 123 Fed. 465, it appeared that the yard master not only assured the train crew on which plaintiff was working that the track was clear, but directed them to proceed along a certain track. The yard master had full power over the trains, subject to an order or rule published by the defendant that all northbound trains should come to a

full stop at a certain point and send a flagman ahead.

In commenting on the alleged negligent order and assurance, the Court at p. 470 say:

> "Here what rendered the track unsafe was the presence on track No. 1 of the cars with which the plaintiff's train collided, left presumably by some employe or employes connected with the operation of trains thereon, and the engineers and conductor of his train were led to take the track because of the direction of the yard master at Twentieth street, who had charge of the yard where it was located, communicated through the yard master at Penn street yard, and of the assurance of the latter, according to plaintiff's contention, that said track was open and clear. No complaint is made of any lack of care in constructing or maintaining the track at the place of injury. *The sole complaint is of lack of care in permitting the cars to be there, and in directing plaintiff's train to go there with the representation that the track was clear. This lack of care was in the operation of the railroad. The employes guilty of it were employes connected with the operation thereof. They were fellow servants, therefore, of the plaintiff in this matter, and no recovery can be had for the injury received because of their negligence."*

We think that this case is on all fours with the case at bar. The train master had the authority to direct

the movements of the train. He did so with an express assurance of safety. He was the superior servant, but this assurance and direction was held to be the assurance and direction of a fellow servant.

And the Supreme Court of the United States, in the case of *Martin v. A. T. & St. F. Rd. Co.*, 166 U. S. 399, 41 L. ed. 1051, which was a case where the foreman of a section gang directed the plaintiff not to keep a lookout, that he, the foreman, would do that because it was his duty to do so, and assured the plaintiff that he would be warned of any danger say:

> "Plaintiff then turned his head backward toward the station, when the foreman told him not to do that; that he had no business to do it, that it was not his business to watch for trains, and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station and continued to look north. In the meantime a worktrain backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of 17 or 18 miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the worktrain, which ran over them, killing the foreman and badly injuring the plaintiff and Mares."

In commenting upon this state of facts the Court say:

> "The case of *Baltimore and O. R. Co. v. Baugh*,

149 U. S. 368 (37 L. ed. 772); *Northern P. R. Co. v. Hambly,* 154 U. S. 349 (38 L. ed. 1009); *Northern P. R. Co v. Peterson,* 162 U. S. 346 (40 L. ed. 994); and *Northern P. R. Co. v. Charless,* 162 U. S. 359 (40 L. ed. 999)—cover this case in all its aspects, and render it entirely clear that all of the employes of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow servants at that time, and hence the defendant cannot be held liable to the plaintiff for the injuries sustained by him as a result of that negligence.

"The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman had failed to do so it was the failure of the defendant to do something which it was bound as a master to do so in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a place for the servant to work in has the slightest application to the facts in this case."

It is upon the authority of this case that *Alaska Treadwell M. Co. v. Whelan* (*supra*) rests.

We submit that this is conclusive of the case at bar. It is conceded, and was so held by the trial court, that in this case the duty of making the place safe was assumed by the servant. The power of the shift boss to advise in reference thereto, or even to control the same, under the rules, was not a withdrawal of this duty from the servants, and not an assumption thereof by the master. In any event, those conditions, contemplated by the rules, under which the shift boss should take control are not disclosed by the evidence. The plaintiff did not request the assistance of the shift boss; his assistance was not needed, as the plaintiff testified that he himself was able to make the place safe without such assistance or interference. As a matter of fact the interference of the shift boss was officious, not contemplated by the rules, or otherwise, and against it the master had no opportunity to guard.

This Court has recognized the rule that a shift boss or foreman is a fellow servant, not only of the miners upon his own shift under him but of the miners and shift boss upon the opposite shift.

In *Davis v. Trade Dollar Consolidated Mining Company*, 117 Fed. 122, this Court held that the negligence of a foreman in examining the face of the tunnel for missed holes, and in making a wrong report as to the location of the missed holes, was the negligence of a fellow servant and not the negligence of the vice principal of the master, which negligence the servant assumed.

And in the case of *Bunker Hill & Sullivan M. Co. v.*

Schmelling, 79 Fed. 263, this Court also recognized this rule, adopting the principle laid down in *Railroad Company v. Peterson* (*supra*) and *Mining Company v. Whelan* (*supra*).

In this case it was conceded by the defendant that it was the duty of the master to furnish the plaintiff with a erasonably safe place in which to work by first causing the stope in which the plaintiff was sent to work to be barred down and freed from loose rock. The plaintiff in that case was not required to perform those duties but was in this instance sent in to do his work before the place had been made reasonably safe. The Circuit Court of Appeals said it does not appear from the record what the duty of the shift boss was. He may, or may not, have been the fellow servant of the plaintiff depending, not upon his control of the other members of the shift, but upon the character of the acts he was required to perform. *R. R. Co. v. Peterson,* 162 U. S. 346; *.Mining Co. v. Whelan,* 64 Fed. 642. If he was such a fellow servant and the accident to the plaintiff happened through his negligence the defendant was not answerable therefor.

And in the case of the *Westport,* 136 Fed. 391, this Court held that the captain of a vessel, in giving a grossly negligent direction, was a fellow servant of the libelant, not only upon principles of maritime law, but upon principles of the common law. This was a case where the master had directed the libelant to attach a rope to the capstan, the other end of which had been attached to the wharf, and the captain backed

the vessel for the purpose of bringing it closer to the wharf. The Court in commenting upon this question say:

> "As has already ben said, there was no evidence that the place where the libelant was hurt was unsafe unless the improper use of the capstan for the purpose of hauling the vessel from the mud alongside the wharf, made it so. And if it be true that the master did undertake to accomplish that result by means of the capstan as testified by the libelant and by two of the other sailors, while it would show gross negligence upon the part of the master, it would be the negligence of the fellow servant of the libelant for which the owner would not be liable."

And in quoting from the case of *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, also decided by this Court, the Court further say:

> "It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes whatever his grade in the common employment."

The Court then cite with approval the case of *Railroad Company v. Conroy* (*supra*), and say that in that case the case of *Railroad Company v. Ross*, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. ed. 787, was finally and squarely overruled, and that the Supreme Court announced the true rule to be, both upon principle and

authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exception if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to establish the same general purpose; or, in other words, if the service of each in his particular sphere or department are directed to the accomplishment of the same general end.

In the case of *Lochbaum v. O. R. & N. Co.*, 104 Fed. 852 (9th C. C. A.) it appeared that the plaintiff was a member of a section gang clearing away debris in a caved cut. He was under the direction of a foreman. A rock came down striking him on the head and inflicting injuries. It was the plaintiff's duty to clean down the cuts under the direction of the foreman. It was contended that the foreman was the vice principal of the defendant and was negligent in not first ordering the men to scrape the banks before beginning work on the ditches and in not stationing a man to warn the gang against falling rock. Upon the question as to whether or not the foreman was a fellow servant the Court say:

> "Upon this statement of the facts we think there can be no question that under the ruling of *Mining Company v. Whelan*, 168 U. S. 86, 42 L.

ed. 390, Peter Grant (the foreman) was a fellow servant of the plaintiff in error."

This case, as already indicated, should be read in connection with *Florence & C. C. R. Co. v. Whipps*, (*supra*).

From a review of the foregoing authorities we come to the inevitable conclusion that the shift boss and the plaintiff were fellow servants. The plaintiff was engaged in a detail of the work. He was engaged in making his place of work reasonably safe, as it was his duty to do under the rules and customs of the mine. The defendant owed him no duty, either in respect of making this place reasonably safe, or in respect of directing him as to the manner in which it should be done as the plaintiff was an experienced workman.

The shift boss undertook of his own volition to interfere in the work which the plaintiff was doing. He did so without the knowledge of the master, without the consent of the master, and without any special or general authority from the master to do so, and under conditions which no reasonable person could claim the master could or should have anticipated. Even if it can be contended that the shift boss was authorized to interfere in this work, that is to direct it, the same nevertheless was purely an executive dettail of the work, and in either assisting or directing the plaintiff in respect thereof, the shift boss was simply a fellow servant. If, for instance, the shift boss, instead of having given the particular direction complained of, had interfered by assisting to bar down a particular

piece of rock, and the shift boss had so negligently carried on those operations as to have injured the plaintiff, it must be manifest that the plaintiff could not recover, for such negligence was the negligence of a fellow servant. If it can not be contended that the mere grade of the shift boss, his mere superiority and his power to direct and control the actions of the plaintiff, is sufficient to make the shift boss the vice principal of the master, then it can not be said that the direction or the assurance of the shift boss to the plaintiff in a matter of executive detail is the direction and the assurance of the master.

We think therefore that the case should have been taken from the jury because there was no actionable negligence proven on the part of the defendant in this case, and the plaintiff assumed this risk.

We have, of course, assumed for the purpose of this argument that the assurance and instructions were actually given. As a matter of fact the evidence as a whole in our judgment does not prove by a preponderance thereof that such assurance and instructions were given. The shift boss denied that he gave this alleged assurance and instruction and testified that what he actually did tell the plaintiff was that the place looked to him to be unsafe. In other words, cautioned the plaintiff against working under the rock. This is substantiated by the testimony of the timberman Berg, who passed by the plaintiff and also cautioned against the apparent danger, but aside from the absolute contradiction of the plaintiff by these two witnesses, the

story of the plaintiff seems to have been an eleventh hour thought. If it had been an actual fact that this assurance and direction were given, and had not been an afterthought on the part of the plaintiff, then the action would without question have been instituted upon that theory. Neither the complaint, nor the amended complaint—between the filing of which two instruments a considerable time elapsed—mention such assurance and direction, but the complaint and the amended complaint were drawn entirely upon the theory that it was the duty of the defendant and not the duty of the plaintiff to make the inspection for the purpose of determining whether there was any loose rock or not, and to see to the removal thereof.

PROPOSITION II.

The alleged order and assurance of the shift boss were contradictory of the rules adopted by defendant, and were given in violation thereof.

As has already been seen, plaintiff recognized it to be his duty under the rules, as well as the customs of defendant's mine, to inspect the particular place for danger, and to bar the ground down upon discovering any danger. We have further seen that in this case plaintiff, an experienced miner, was about to make such tests, and that he could have discovered the danger and could have efficiently guarded against the same without the assistance or interference of the shift boss. Plaintiff did not seek, nor apparently desire, the shift boss' assistance. He knew that he (the plaintiff)

had, at the time the shift boss came around, not made the examination required of him by the rules and customs, and knew the shift boss had not made, or been able to make, a personal examination. Plaintiff simply claimed that the shift boss said he had found out the place was all right. The testimony of plaintiff is:

> "Q. Did he (the shift boss) say anything to you whether he had tested it himself?
>
> "A. No. He said he found out the place was all right." (Tr. p. 46).

The evidence discloses that actually the shift boss had made no examination himself and had no information or knowledge concerning the matter other than the casual visual examination which he was enabled to make in passing, and the plaintiff's testimony is conclusive that such examination under the then existing circumstances was entirely insufficient. We have then a positive order of the master to the plaintiff to examine the ground himself and to render it safe, fortified, as such rules were, by the customs of the mines; and further a direction to the plaintiff to notify the shift boss in case that he was unable to render his place reasonably safe, that is, encountered some special danger or some extraordinary condition, neither of which existed here. We have further an authorization and direction to the shift bosses to assist the men when required by them to do so, but nowhere do we find that, either in the rules or by virtue of the general powers of the shift boss, was the latter authorized officiously, wrongfully, and even wantonly, to interfere with the

work of the employes, by giving the alleged assurance and direction. Against such interference the defendant could not guard because he could not foresee the same. In the absence of allegation and proof of incompetence of the shift boss, and the defendant's knowledge thereof, there can be no recovery of the defendant for such acts; first, for the reason that the plaintiff himself will not be permitted to disregard and violate a positive rule of the master by accepting the alleged assurance and following the shift boss' orders, both of which violated the defendant's rules; and second, because the master had no opportunity to guard against such violation on the part of the shift boss.

That the servant who violates a rule or order of the master upon the orders of a superior servant accepts the risks of such obedience is lucidly illustrated in the case of *Indiana Natural & Illuminating Gas Co. v. Marshall,* 52 N. E. 232 (Ind.)

This was a case where the defendant had by general written and posted order directed all its men to look to the foreman, George Marshall, for instructions. By a special instruction the superintendent had instructed plaintiff to work upon the ground. Thereafter the foreman directed plaintiff to climb a pole. In this case the foreman was held a vice-principal of the master, but the court held that plaintiff obeyed the latter's instructions at his risk in view of the instruction given him by the superintendent to stay upon the ground.

The court in commenting upon the state of facts say:

"It is argued, however, by appellee's counsel, that George Marshall, who ordered appellee to climb the pole when injured, was a vice-principal, and had authority to give instructions to employes by reason of a notice which had been posted in appellant's building, which read: 'On and after May 1st, all employes of the electric light company will look to George Marshall for instructions. (Signed) H. D. Natcher.' Appellee testified, in answer to a question whether Natcher gave him orders to obey anybody else, that 'he didn't give me orders directly himself.' The evidence is undisputed that if George Marshall had authority to direct appellee to do certain work, and the jury answered that he had, he got the authority from Natcher. The question then arises whether the general instructions given all the employes by the superintendent on May 1st to look to George Marshall, who had charge only of certain work, for instructions, or the special instructions given appellee by the superintendent afterwards as to particular work, should control as to that particular work. It is not shown by the jury's answers, or by any evidence, that the special instructions given appellee about the 1st of July, that he should work on the ground, were ever rescinded, or in any way modified. The authority Natcher gave Marshall over appellee could be revoked in whole or in part, and the verdict certainly shows that appellee had instructions from the superintendent himself not to do the very work he was doing when injured.

Apellee knew that Marshall's authority was derived from Natcher, and from the jury's answers we must conclude that Natcher had given him special instructions to work on the ground. If a master employs a servant, and instructs him personally not to do certain dangerous work, it is his duty to disregard an order of a vice-principal to do that particular work; and if he chooses to disregard the instructions of the master, and follow the orders of the vice-principal, he does so at his own risk, so far as the master is concerned. An employer may have good reason for directing a particular employe not to do certain work, and, when such instructions have been given, the employe has no cause of complaint if injured in consequence of such disobedience. A foreman or vice-principal has no authority to place a liability upon the principal which the principal has expressly declined to assume. And, if an employe, as in the case at bar, chooses to disregard special instructions of his principal, and follow those of a vice principal under authority previously given, he must do so at his own risk. It is true that ordinarily the employe has the right to look to his immediate superior for directions in his work, but this rule can not be held to apply to a certain kind of work, where the master has given the employe personal instructions not to do that particular work."

There is not only no proof whatsoever in this case that the shift boss was, under the then circumstances, authorized by the master to give either such assurance

or direction, but the proof conclusively shows that he was not clothed with such authority; and that, if he actually gave such assurance and direction, it was in direct violation of his duties to the master and specifically in violation of the rules themselves.

Labatt on Master & Servant, 2nd Edition, Par. 1359, says:

> "On general principles it is manifest that where the order in question was not given by the employer himself, he can not be made responsible for an injury caused by obedience to it, unless it proceed from an agent who had authority to give a direction with regard to the subject matter."

And again in Par. 1371 says:

> "There is a distinct and explicit authority for the view that an assurance of safety is binding upon an employer only when it is given by a vice-principal. This would seem to be the only logical doctrine in cases where the defendant explicitly denies the representative character of the employee from whom the assurance proceeds."

So that, not only must it appear that the person giving the direction and assurance is acting in the capacity of a vice-principal, but it must appear that such person was authorized in that capacity to give such assurance. We have already seen that the shift boss was a fellow servant.

And in the case of *Pennsylvania Co. v. Fishback,* 123 Fed. 465, where it appeared that a rule of the company

to bring trains to a stop at a certain point was violated under the orders of a superior servant, the yard master, coupled with an assurance that the track was clear, the Circuit Court of Appeals of the 8th Circuit, say:

> "The duty of complying with the rules and regulations which had been promulgated and of carefully operating the trains is a duty encumbent upon those employes to whom their operation has been entrusted. *All employees so engaged are fellow servants*, and no recovery can be had against the railroad company for an injury sustained by one of such employes due to the negligence of another."

As has already been stated the master is in no case obligated to anticipate breaches of duty on the part of his servants. This is made very clear in the case of *American Bridge Co. v. Seeds* (*supra*), where the Court say:

> "There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his action upon the supposition that his servants will obey the law and faithfully discharge their duty. The legal presumption is that they will do so and this is the only practicable basis for the measurement of the acts, rights or remedies of mankind."

In the case of *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, it appeared that a collision occurred between two trains by reasons of a violation of a rule of the de-

fendant that a brakeman should be stationed out and torpedoes placed upon the track. The Court on page 950 say:

"It was the duty of the crew of the freight train to place torpedoes on the track at least fifteen telegraph poles in the rear of their train when it stopped at the place of the collision, and to station a brakeman ten or twelve telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey these rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the nature and probable result of its acts and omissions upon this supposition. Indeed it could reckon upon no other, and it is alike impracticable and impossible to predicate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate laws. No one who reckoned on the faithful discharge of their duties by these employes could reasonably have anticipated this fatal collision as either a matter of probable consequence of the failure to give these notices, nor could it have been the result of such failure, had not the unforeseen negligence of the engineer of the extra train, and the gross and unexpected carelessness of the crew of the freight train, intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of the rules and the or-

> ders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been; and it is to this, and not the failure to give the notices, in our opinion, that this accident must be attributed under the maxim *'Causa proxima, non remota spectatur.'* "

So in the case at bar the defendant had a right to assume that the plaintiff and the shift boss would not violate their duty to make the place in which plaintiff was working reasonably safe—by the plaintiff in case he could do so alone, and by the plaintiff and the shift boss or others who might be called to assist, in case that the plaintiff could not make the place safe by himself. The master could not in this case have anticipated that the shift boss would, without having himself made the necessary inspection and knowing that such inspection had not been made, carelessly, negligently, and even wantonly, advise the plaintiff that the place was safe and direct him to proceed to work there.

Moreover, it is universally held that the master is not required to supervise every detail of the work. So in the case at bar it was not the duty of the master, either to make the inspection of the place where the plaintiff was working, or to make the same safe by causing the barring down of loose rock, or the removal thereof by other methods. Consequently it was not the duty of the master to instruct an experienced servant in reference to this particular piece of work, and, inasmuch as

the master had no duty to perform toward the plaintiff in this regard, it can not be said that the shift boss, in giving assurance of safety and directing the plaintiff to set to work, was acting on behalf of the master.

American Bridge Co. v. Seeds, (supra).

In *Deye v. Lodge and Shipley Machinery Tool Co* (supra), it was held that the defendant company owed no personal duty as master to supervise the manner in which the beds were piled, and could not be held liable for an injury to a fellow servant of the foreman caused by the slipping of one of the castings from a pile near which he was working and which was alleged to have been improperly built, on the theory that he was not furnished with a reasonably safe place in which to work, the piling of the castings being a detail of the work itself, the risk from which was assumed by the workman.

It therefore appears that, not only was the shift boss a fellow servant, and his alleged assurance and direction were violations of the rules themselves, but the defendant could not possibly have anticipated such flagrant violations of its rules and of the duties of the shift boss and plaintiff which they respectively owed to the defendant. And lastly the master is never required to supervise the mere executive details of the work.

We therefore respectfully submit that the judgment should be reversed.

Respectfully submitted,

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